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In The

Supreme Court of the United States

OCTOBER TERM, 1983

NO.

JOLENE GUSTAFSON,

Petitioner

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the Board of Governors is not reported. The panel opinion of the Fifth Circuit is reported at 717 F.2d 242 (1983), and the opinion denying rehearing and rehearing en banc is reported at 720 F.2d 1291 (1983).

JURISDICTION

The Court of Appeals for the Fifth Circuit, as shown below, lacked jurisdiction under 12 U.S.C. § 1848 to review the order of the Board of Governors of the Federal Reserve System, and that court so held. This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review that decision of the Court of Appeals.

QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit correctly hold that Petitioner was not a "party aggrieved" within the meaning of 12 U.S.C. § 1848 and was therefore not entitled to judicial review of the order of the Board of Governors of the Federal Reserve System approving Intervenor's application to become a bank holding company?

STATEMENT OF THE CASE

(1) Course of Proceedings and Disposition in the Forum Below

On December 1, 1981, Raymondville State Bancshares, Inc., the Intervenor in the judicial proceedings below, filed an application with Respondent for prior approval of action to become a bank holding company, pursuant to the provisions of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-1850 (the "Bank Holding Company Act"). The application contemplated the acquisition of all the outstanding shares of capital stock of Raymondville State Bank (the "Bank"), by means of an interim bank merger. On February 26, 1982, the Federal Reserve Bank of Dallas, acting on delegated authority, approved the application. As provided by the Bank Holding Company Act, the approval became final on April 21, 1982.

On March 1, 1982, Petitioner filed a petition with Respondent seeking review of the approval order of February 26, 1982. She alleged that the related but independent tender offer for all of the outstanding shares of stock of the Bank, announced by John A. Calkins, Jack Funk, Ralph W. Hutchins, Charles B. Scott, and James Whitfield (the "Principals" of Intervenor), together with certain of their

family members and related business entities (collectively, the "Majority Shareholders"), was unfair to the minority shareholders. On May 10, 1982, Respondent affirmed the approval of Intervenor's application and denied Petitioner's request for review, in an opinion which held that Petitioner lacked standing to raise her objections, but which nonetheless examined and discussed Petitioner's substantive arguments and found them to be meritless.

During the pendency of the proceedings before Respondent, Petitioner sought review by the Court of Appeals. On March 11, 1982, she requested a temporary restraining order prohibiting the Majority Shareholders from purchasing any shares tendered in the tender offer. That petition was denied the same day. On March 26, 1982, she petitioned the Court of Appeals to review the February 26 approval order of the Federal Reserve Bank of Dallas. On April 16, 1982, she filed a petition for a stay of the effectiveness of the approval order and an injunction prohibiting the Majority Shareholders from purchasing the tendered shares. On April 21, 1982, the Court of Appeals granted that petition to the extent that it sought a stay of the February 26 approval order. That same day, Petitioner filed a motion to enlarge that stay such that it would contain a prohibition on the Majority Shareholders' purchase of the tendered shares. On April 22, 1982, the Court of Appeals denied the motion to enlarge the stay and dissolved the stay entirely. Also on April 21, 1982, Intervenor filed its motion for permission to intervene in and be a party to the proceedings in the Court of Appeals, and an order granting such permission was entered on May 10, 1982. On June 4, 1982, following Respondent's decision of May 10, 1982, upholding the approval of Intervenor's application, Petitioner filed a petition with the Court of Appeals for review of that order

and a motion to consolidate the two causes. On June 11, 1982, the Court of Appeals issued a consolidation order.

On October 17, 1983, the Court of Appeals denied Petitioner's request for review, holding that she lacked standing due to her failure to participate in the administrative proceedings precedent to Respondent's approval of Intervenor's application. On October 31, 1983, Petitioner petitioned for rehearing by the Court of Appeals and made a suggestion for rehearing en banc. Those requests were denied on November 17, 1983.

(2) Statement of Facts.

Intervenor's application filed with Respondent proposed that Intervenor would acquire one hundred percent of the outstanding stock of the Bank, pursuant to a merger between an interim bank, chartered and wholly owned by Intervenor, and the Bank. The merger transaction was subject to various regulatory approvals and to the approvals of two-thirds of the shareholders of both banks and a majority of the directors of both banks. Although the proposed tender offer did not require the prior approval of Respondent or any other regulatory agency, state or federal, the application did contain full disclosure that the Majority Shareholders intended to make a tender offer for the purchase of up to one hundred percent of the outstanding stock of the Bank.

Notice of the proposed tender offer was published in the *Raymondville News/Chronicle* on January 28, 1982, in accordance with the Texas tender offer guidelines which required at least twenty-one days' notice of a tender offer. The tender offer documents were mailed to the shareholders of the Bank, including Petitioner, on March 3, 1982. The offer contained a description of the proposed holding company formation, so that each shareholder had an oppor-

tunity to decide whether to sell his or her shares or to become a shareholder of the holding company when its acquisition of the Bank stock was consummated. Sixty-four shareholders tendered a total of 38,448 shares (out of a total of 80,000 shares outstanding), reducing the number of shareholders from eighty-seven to twenty-two. In accordance with the terms of the offer contained in the documents mailed to the shareholders, the Majority Shareholders accepted the tendered shares on April 23, 1982. They purchased those shares on June 1, 1982.

Prior to this controversy, Petitioner controlled 4,400 shares, 1,000 in her own name and 3,400 owned by the estate of her late husband, giving her 5.5 percent of the stock of the Bank and making her the fourth largest shareholder. During the pendency of the Majority Shareholders' tender offer, Petitioner's counsel wrote a letter to the shareholders of the Bank, asking that they not sell to the Majority Shareholders. In response to that letter one shareholder sold 4,650 shares to Petitioner, raising her total to 9,050 shares, or 11.31 percent of the stock of the Bank. Prior to the tender offer, the Principals and other Majority Shareholders controlled blocks of shares ranging from 1.0 percent to 10.95 percent. Following the purchase of the tendered shares, their holdings ranged from 2.34 percent to 25.58 percent. Petitioner, despite her claim that the Principals' actions changed her position, remained the fourth largest shareholder of the Bank.

On June 22, 1982, a special meeting of the shareholders of the Bank was held to consider and vote on the merger transaction. Petitioner attended the meeting and abstained from voting, but did not exercise her dissenters' rights to object to the merger. The shareholders voted, 86 percent to 0 percent, with 14 percent abstaining, to approve the merger.

Following receipt of the approvals of the Federal Deposit Insurance Corporation and the Texas Banking Commissioner, in both cases following an unsuccessful challenge by Petitioner, the merger was consummated on December 31, 1982.

ARGUMENT

Petitioner's complaint is chiefly directed at the tender offer made by the Majority Shareholders. Petitioner contends that the Principals, because they are directors of the Bank, had a duty to refrain from attempting to increase their individual stock holdings by means of a tender offer made to all other shareholders of the Bank. Although no regulatory approval was required for the Majority Shareholders to make the tender offer, Petitioner has attempted to challenge the fairness of the tender offer indirectly, by seeking judicial review of Respondent's order approving Intervenor's acquisition of the Bank.

The court below correctly held that Petitioner was not entitled to such review. The Bank Holding Company Act, at 12 U.S.C. § 1848, provides that a "party aggrieved" by an order of the Federal Reserve Board may obtain a review of such order. In order to have been a "party aggrieved," Petitioner must have participated in the administrative proceedings prior to the issuance of Respondent's order. The record shows, and Petitioner does not dispute, that she failed to participate in the administrative proceedings leading to the Board's order.

Petitioner argues that the requirement of participation in the prior administrative proceedings should be inapplicable to her, and to her alone, because she did not receive actual notice of the pendency of Intervenor's holding company application. She asserts that, with respect to her, actual notice was the minimum required by due process considera-

tions. This argument is fundamentally deficient, because the Court below did not hold, as Petitioner asserts that it held, that "property can be taken in administrative proceedings without affording due process." (Petition, page 2). Petitioner was not deprived of any property or liberty interest. Despite repeated references in her petition to having her "shares taken," she remains the owner of exactly the same number of shares and the same percentage of total outstanding shares before and after the Principals purchased the additional stock pursuant to the tender offer. She became a shareholder of the holding company, following consummation of the merger, and holds exactly the same number of shares and percentage of holding company stock as she did bank stock immediately prior to the merger. Her ownership position has been unaffected by the tender offer and was affected by the merger on exactly the same basis as were the holdings of every other shareholder. Due process, and its constituent element, notice, is not a right that must be accorded in the abstract. Rather, notice is necessary before an individual is deprived by governmental authority of a liberty or property interest. Petitioner has not been so deprived.

Furthermore, actual notice of the pendency of Respondent's Application would have been irrelevant to Petitioner's fundamental claim. Petitioner asserts that publication in the Raymondville newspaper and in the *Federal Register* was inadequate, but she has never challenged the content of that notice. The notice addressed the filing of the application to become a bank holding company, but did not in any manner allude to the fact that certain shareholders of the Bank would be making a tender offer. Petitioner has not shown that actual receipt of notice concerning the filing of the holding company application would have altered her ability to raise her objections to the tender offer.

CONCLUSION

Petitioner was not deprived of any constitutionally protected interest, and thus no greater notice than was given was constitutionally required. Petitioner's failure to appear in administrative proceedings before Respondent should not be excused. The court below was correct in holding that Petitioner was not a "part aggrieved" and therefore not entitled to judicial review of Respondent's order. For the foregoing reasons, Intervenor respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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PROOF OF MAILING — AFFIDAVIT

I, Louis J. Weber, one of the attorneys for Raymondville State Bancshares, Inc., intervenor herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of March, 1984, I deposited in a United States mailbox, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Response of Intervenor.

Louis J. Weber

Subscribed and sworn to before me, at Dallas, Texas, this ..... day of January, 1984.

Notary Public in and for
the State of Texas

My commission expires:

AFFIDAVIT OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Intervenor was served on the petitioner's counsel of record, by depositing same in a United States mailbox, with first class postage prepaid, on this fifteenth day of March, 1984, to the following parties at the addresses shown:

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Respectfully submitted,

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By: _____

Subscribed and sworn to before me, at Dallas, Texas, this ..... day of March, 1984.

_____
Notary Public in and
for the State of Texas

My commission expires:

_____

END OF DOCKET